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No. 1183

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT F. URBANO, *Petitioner,*

—against—

FREDERIC SONDERN, JR., *Respondent,*

and

ROBERT F. URBANO, *Petitioner,*

—against—

FAWCETT PUBLICATIONS, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, FAWCETT PUBLICATIONS, INC., IN OPPOSITION

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JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 29, 1966. Petitioner's motion to extend time to file petition for rehearing or to rehear in banc on papers before the Court was denied on January 6, 1967. Petitioner's motion to remand

this case to the United States District Court for the District of Connecticut was denied January 10, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit abused its discretion in unanimously affirming the order of the District Court of Connecticut dismissing the action for alleged libel as frivolous.

STATEMENT

Petitioner—not a stranger to this Court[1]—seeks his third writ of certiorari in the October, 1966 Term of this Court while serving a life sentence in New Jersey State Prison for the crime of homicide committed in the act of robbing a department store. The facts underlying this petition are set forth in chronological order.

Prior To Publication Of Article Complained Of

January 15, 1960—

Petitioner vaulted the counter in the credit department of Bamberger's Department Store at Garden State Shopping Center, Paramus, New Jersey, brandished a .32 automatic pistol and snarled "This is a holdup! Nobody move!" He then shot John Blanch in the chest and shoulder, Fred Kramer in the arm and Leo Zaritsky in the head. Zaritsky died.

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[1] *Urbano* v. *New Jersey*, 225 F. Supp. 798 cert. den. 377 U. S. 958, aff'd. 333 F. 2d 845, cert den. 379 U. S. 993; *Urbano* v. *Federal Bureau of Investigation*, cert, den. 385 U. S. 862 (October Term, 1966) *Urbano* v. *DeLoach*, cert. den 385 U. S. 1017 (October Term, 1966).

Petitioner was overpowered and disarmed by customers at the store, arrested by Paramus, New Jersey police officers, and taken to the Bergen County Jail in Hackensack, N. J. (App. C 13a pp. 1-2)[2]

January 25, 1960—

Indictment No. S-253-59 charging petitioner with murder while in the commission of a robbery was filed. (R 81)[3]

April 27, 1960—

Petitioner pleaded non vult to the indictment. (R 81)

May 19, 1960—

Petitioner was sentenced to life imprisonment in New Jersey State Prison. (R 81)

September 14, 1960—

Petitioner gave oral and written statements to Donald T. Klinger and Francis C. O'Neil, Special Agents of the Federal Bureau of Investigation, stating that plaintiff had robbed banks and department stores in the Philadelphia, Baltimore, Wilmington and Pittsburgh areas. (R 180-230)

September 14, 1961—

The Federal Bureau of Investigation issued a report (App. C 13a R 83) to the press on the official results of its investigation on petitioner. (R 239)

STATEMENT OF CASE

Petitioner brought suit for alleged libel in the United States District Court for the District of Connecticut upon

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[2]Reference to pages in Appendix of Petition.
[3]Reference to page in Record on Appeal in Court of Appeals.

the claim that he had been libeled by the statement, "He robbed at least 13 banks and 3 department stores . . . of perhaps a quarter million dollars." (R 6, R 58)

The article complained of (App. E 16a, R 8) was published in the January 1963 issue of TRUE Magazine, and was based on the September 14, 1961 report of the Federal Bureau of Investigation. (App. C 13a, R 83) Nowhere in the article was it reported that the petitioner was convicted of any crime other than that to which he pleaded *non vult* to an indictment charging him with murder in the commission of a department store robbery. (R 81)

Petitioner claims he was not *convicted* of robbing a bank, yet by his confessions to agents of the Federal Bureau of Investigation petitioner admitted in 10 written statements that he had robbed banks. (R 180-230)

The District Court in Connecticut on its determination that the petitioner's claim for alleged libel was frivolous had before it the answer of the respondent, Fawcett Publications, Inc., denying generally the allegations of the plaintiff's complaint, pleading the petitioner's *non vult* plea to the indictment charging him with murder in the commission of robbery and plaintiff's sentence to life imprisonment, separate defenses that the article published in the January, 1963 issue of TRUE Magazine was privileged, based upon the official report of the United States Department of Justice, Federal Bureau of Investigation, dated September 14, 1961, that the publication related to matters of public interest which was a proper subject of comment and published on an occasion of privilege in good faith and without malice toward plaintiff, that the occasion of privilege was not abused and that the defendant relied upon good and trustworthy sources in its publication of the article. (R 76, R 259)

These pleaded defenses were documented by exhibits (R 81, R 180-230, R 83, R 239), consisting of the judgment of conviction of the petitionter, certified copies of the 10 confessions signed by the petitioner, affidavits of 2 agents of the Federal Bureau of Investigation to whom plaintiff gave the written statements, as well as a copy of the official report of the United States Department of Justice, Federal Bureau of Investigation, dated September 14, 1961.[4]

Additionally, the respondent's answer denied plaintiff's claim that a retraction was demanded. It is significant that the District Court of Connecticut considered and rejected plaintiff's claim in this regard, finding that petitioner made no timely demand under applicable Connecticut statute. (App. B 10a).

Judgment of the District Court

In his "Memorandum of Decision" (App. B 6a, R 298) District Court Judge Robert C. Zampano, finding as a matter of fact that this action was "frivolous" (9a, R 301), had "a patent lack of merit" (10a, R 302) and "virtually nonexistent" chances of success (10a, R 302), and that "it would be most unfair to require any further expenditure of time, effort and money in these frivolous and futile actions" (12a, R 304), ordered the action dismissed pursuant to 28 U. S. C. § 1915 (d).

[4]The official F. B. I. report of September 14, 1961 (App. C 13a, R 83) documents petitioner's criminal career, as such career was revealed by the F. B. I. investigation, making the statement, "Between 1954 and 1959, 13 bank robberies and two department store holdups were attributed to Urbano," (18a, R 87), with earlier references to the robbing of 4 department stores; Kanns, in Arlington, Virginia; Strawbridge in Wilmington, Delaware; Wanamaker's Department Store at Wilmington, Delaware (17a, R 87); and Bamberger's Department Store in New Jersey, where petitioner shot three people, killing one.

Judgment of the Court of Appeals

The Court of Appeals unanimously affirmed the dismissal of this action as frivolous, noting that it seemed highly unlikely that petitioner "could surmount either the defense of truth, or of qualified privilege to report the activities of public officials." (App. A 3a)

ARGUMENT

There is nothing here present warranting review by this Court on certiorari. There is no important question of Federal law; there are no conflicting decisions in the separate circuits; petitioner has been afforded due process; his underlying action is frivolous, and dismissal thereof pursuant to 28 U. S. C. § 1915 was proper and not an abuse of discretion.

POINT I

PETITIONER HAS HAD A FULL AND FAIR HEARING ON HIS CLAIM FOR ALLEGED LIBEL.

Petitioner has received the utmost cooperation and consideration from the District Court of Connecticut in the prosecution of his alleged claim for libel. The District Court granted the petitioner's application to file his complaint without pre-payment of a fee on November 19, 1963. Thereafter, the District Court granted petitioner's application for appointment of counsel to represent him in this action on January 11, 1966 and only then, after a full hearing was petitioner's claim dismissed as frivolous on June 27, 1966.

Prior to exercising its discretion under 28 U. S. C. § 1915, the District Court had the benefit of all the pleadings, oral argument by counsel for both sides and a voluminous file containing: (1) *pro se* briefs and exhibits numbering hundreds of pages; (2) lengthy affidavits; (3) the F. B. I.

report of September 14, 1961; (4) petitioner's ten written statements admitting the robbery of divers banks and department stores and; (5) Judge Galanti's Order finding petitioner competent to enter his plea of *non vult* to the indictment charging him with the crime of murder committed in the act of robbery. (App. B 9a, R 301)

On the day of the argument of petitioner's appeal in the Court of Appeals for the Second Circuit, November 16, 1966, the Court requested respondents to submit on the appeal, lest argument on the part of respondents without argument by petitioner would, in some way, prejudice the rights of petitioner, to which request respondents consented.

There can be no argument that petitioner did not receive every consideration provided by 28 U. S. C. §1915.

POINT II

THE ACTION IS FRIVOLOUS

The gravamen of petitioner's claim is that he has been libeled by the statement "he robbed at least 13 banks and 3 department stores . . . of perhaps a quarter million dollars." (R 6, 58) This statement was contained in the official F. B. I. report.

This report of September 14, 1961 (App. C 13a R 83), was reported by the respondent in TRUE Magazine; petitioner had *admitted* in written statements that he robbed banks (R 180-230) and pleaded non vult to an indictment charging him with murder in the commission of a department store robbery. (R 81)

This action for damages for injury to the reputation of a convicted murderer and self-admitted bank robber was found devoid of merit and, therefore, frivolous for the following reasons:

(1) The truth of statements complained of in the article —that petitioner robbed banks is established by petitioner's written statements to that effect (R 180-230);

(2) The article complained of was based upon an official report of the Federal Bureau of Investigation published on an occasion of privilege without malice and is privileged; and

(3) The complaint failed to state a claim upon which relief can be granted; the petitioner made no timely demand for a retraction, did not allege actual damage, and the Court found it unlikely that petitioner could prove actual malice. (Conn. Gen. Stat. § 52-327 [1958]; App. B 10a).

POINT III

DISMISSAL OF THE ACTION WAS PROPER AND DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

Petitioner was allowed to proceed *in forma pauperis* and only after a most exhaustive examination of his claim was it dismissed as frivolous. Petitioner has not been deprived of a forum because of his poverty; his claim has been dismissed because it is devoid of merit.

CONCLUSION

It is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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